No. 16215

In the United States Court of Appeals for the Ninth Circuit

LESLIE M. SIBERELL, ON BEHALF OF HIMSELF AND HIS CO-DEFENDANTS, OLIVER D. SIBERELL, JAMES P. SIBERELL, MARTHA E. JONES, DAISY M. BISHOP, AND MABEL ROBSON, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the Southern District of California, Central Division

BRIEF FOR THE UNITED STATES, APPELLEE

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OPINION BELOW

The district court did not write an opinion. The order denying the motion to vacate judgment appears in the Record at page 35.

JURISDICTION

This is an appeal from an order filed June 4, 1958 (R. 35), denying a motion to vacate a portion of a judgment entered November 1, 1957 (R. 40), awarding just compensation for property condemned by

the United States. Notice of appeal from the order of June 4, 1958, was filed July 28, 1958 (R. 36). The jurisdiction of the district court presumably was invoked under Rule 60(b) of the Federal Rules of Civil Procedure.[1] The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

QUESTION PRESENTED

Whether the trial court in June 1958 correctly denied appellants' motion to vacate a judgment entered in a condemnation proceeding on November 1, 1957, when appellants had adequate notice of the proceeding by publication in conformity with the provisions of Rule 71A, F.R.Civ.P., as well as personal notice in July 1957.

FEDERAL RULES INVOLVED

Rule 60 of the Federal Rules of Civil Procedure provides in pertinent part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud

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[1] Jurisdiction of the condemnation action was originally invoked by the United States under the Act of March 27, 1942, 56 Stat. 176, and the Act of June 26, 1943, 57 Stat. 197.

(whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

Rule 71A of the Federal Rules of Civil Procedure provides in pertinent part:

(d) Process.

* * * *

(3) Service of Notice.

* * * *

(ii) Service by Publication. Upon the filing of a certificate of the plaintiff's attorney stating that he believes a defendant cannot be personally served, because after diligent inquiry within the state in which the complaint is filed his place of residence cannot be ascertained by the plaintiff or, if ascertained, that it is beyond the territorial limits of personal service as provided in this rule, service of the notice shall be made on this defendant by publication in a newspaper published in the county where the property is located, or if there is no such newspaper, then

in a newspaper having a general circulation where the property is located, once a week for not less than three successive weeks. Prior to the last publication, a copy of the notice shall also be mailed to a defendant who cannot be personally served as provided in this rule but whose place of residence is then known. Unknown owners may be served by publication in like manner by a notice addressed to "Unknown Owners."

Service by publication is complete upon the date of the last publication. Proof of publication and mailing shall be made by certificate of the plaintiff's attorney, to which shall be attached a printed copy of the published notice with the name and dates of the newspaper marked thereon.

STATEMENT

The undisputed facts of this case, as shown by the Record, may be summarized as follows: This appeal involves one tract of land, designated Parcel 481, located in San Bernadino County, California, which was among many tracts taken by the United States in a lawfully-instituted condemnation proceeding to acquire land for the establishment of a Naval Ordnance Test Station at Inyokern, California. The records in San Bernadino County disclosed that one of the owners of a mining claim on Parcel 481 was Minnie V. Siberell (denoted as both "Siberell" and "Liberell" in those records). On April 19, 1956, pursuant to Rule 71A, F.R.Civ.P., *supra*, the United

States filed a certificate for service by publication, listing Minnie V. Siberell (denoted "Liberell" in the certificate) as one of the defendants who could not be personally served in this action because, after diligent inquiry within the State of California, her place of residence could not be ascertained (R. 4). Accordingly, on May 22, 1956, the United States filed a certificate of publication stating that it had caused publication once a week for three consecutive weeks in the San Bernardino Evening Telegram and The Evening Index of the notice of filing of the complaint and amended complaints in this condemnation action (R. 4). Listed in these publication notices as one of the persons having an interest in the mining claim known as the Bird's Eye Porphyry Lode (Parcel 481) was Minnie V. Siberell (again denoted "Liberell").

At the hearing to determine just compensation held on July 22 and 23, 1957, the United States presented competent evidence as to the value of Parcel 481. No person claiming an interest in this parcel entered an appearance. Appellant Leslie M. Siberell, one of the heirs of Minnie V. Siberell, admittedly received personal notice by telephone of this proceeding on July 22, 1957 (R. 27). Correspondence between the appellant and the United States Attorney concerning this condemnation action ensued during August and September 1957 (R. 18-20). On October 22, 1957, the findings of fact, conclusions of law, judgment and decree in this condemnation action were lodged with the court (R. 9-14), and copies thereof were mailed to appellant Siberell on the same

date (R. 7-8). Judgment was entered November 1, 1957 (R. 40).

A motion to vacate the judgment was filed May 8, 1958,[2] wherein appellant Siberell alleged that he had never been personally notified of the condemnation action, and requested that the judgment be vacated so that he could show that the amount awarded for Parcel 481 was inadequate (R. 24). This motion was supported by affidavits (R. 26, 31). The Government contended that it had complied with the notice requirements of the Federal Rules of Civil Procedure applicable to unknown parties in condemnation actions and that, in any event, appellant Siberell had actual notice of the proceedings months before judgment was entered and therefore was not entitled to vacate the proceedings (R. 28). After a hearing on May 26, 1958, where he heard oral argument and considered all the files and records in this case, Judge William M. Byrne denied the motion to vacate judgment by an order filed June 4, 1958 (R. 35). This appeal followed (R. 36).

ARGUMENT

I

The Trial Court Did Not Abuse Its Discretion in Denying Relief Under Rule 60(b) of the Federal Rules of Civil Procedure

A. *A motion to vacate judgment under Rule 60 (b) is addressed to the sound discretion of the trial*

[2] An earlier motion to vacate the judgment on the same grounds had been filed on March 25, 1958, and denied by the court without prejudice on April 7, 1958 (R. 41).

court and no abuse of discretion is shown:—Appellants correctly state that under Rule 60(b), F.R. Civ.P., a motion for relief because of excusable neglect may be made within one year after entry of judgment, but the vital issue in this case is whether the district court erred in denying the appellants' motion. It is well settled that a motion to vacate a judgment is "addressed to the sound legal discretion of the trial court, and its determination will not be disturbed except for an abuse of discretion." *Independence Lead Mines Co.* v. *Kingsbury*, 175 F. 2d 983, 988 (C.A. 9, 1949), cert. den. 338 U.S. 900; *Atchison, Topeka and Santa Fe Railway Co.* v. *Barrett*, 246 F. 2d 846 (C.A. 9, 1957); *Cole* v. *Fairview Development*, 226 F. 2d 175 (C.A. 9, 1955), cert. den. 350 U.S. 995; *Stafford* v. *Russell*, 220 F. 2d 853 (C.A. 9, 1955); *Perrin* v. *Aluminum Co. of America*, 197 F. 2d 254 (C.A. 9, 1952); *Union Bleachery* v. *United States*, 176 F. 2d 517 (C.A. 4, 1949). In a case only recently decided, this Court stated that "[t]he rule that a motion made under Rule 60(b) F.R.C.P. is addressed to the sound discretion of the trial court is well established." *Kolstad* v. *United States*, No. 15871, decided January 7, 1959, rehearing denied February 3, 1959.

Appellants have not and cannot show an abuse of discretion in this case. The situation was this: The Government, checking the records in the county where the land to be taken was situated, located several names of persons having or claiming an interest in the Bird's Eye Porphyry Lode. After due inquiry had failed to divulge the place of residence of Minnie

V. Siberell, the United States proceeded to give the publication notice provided by Rule 71A(d)(3)(ii), F.R.Civ.P. There was full compliance with the notice requirements of that rule, including the filing of a certificate for service by publication (R. 4), a certificate of publication (R. 4), and an affidavit of publication (R. 5). It cannot now be argued that such procedure does not constitute adequate notice,[3] for the Federal rules applicable to condemnation proceedings instituted by the United States specifically provide that where a person's residence is unknown and cannot be ascertained by the condemnor, service by publication is the appropriate procedure. See Rule 71A(d)(3)(ii), *supra* p. 3. That constructive notice in such situations fully comports with the due process requirements of the Fifth and Fourteenth Amendments was authoritatively established before the formulation of Rule 71A. Thus, in *Mullane* v. *Central Hanover Trust Co.*, 339 U.S. 306 (1950), the Supreme Court stated (pp. 317-318):

> This Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situ-

[3] In fact, appellants did not below and do not on appeal challenge the constitutionality of publication notice in condemnation proceedings generally or as applied in this case. As shown *infra*, an argument to that effect would be to no avail.

> ation permits and creates no constitutional bar to a final decree foreclosing their rights. *Cunnius* v. *Reading School District*, 198 U.S. 458; *Blinn* v. *Nelson*, 222 U.S. 1; and see *Jacob* v. *Roberts*, 223 U.S. 261.
>
> Those beneficiaries represented by appellant whose interests or whereabouts could not with due diligence be ascertained come clearly within this category. As to them the statutory notice is sufficient. * * *
>
> * * * *
>
> Accordingly we overrule appellant's constitutional objections to published notice insofar as they are urged on behalf of any beneficiaries whose interests or addresses are unknown to the trustee.

Notice by publication is even more appropriate to condemnation proceedings which are *in rem*. Indeed, such a procedure is not only valid but essential. Thus, in Nichols, Eminent Domain, 3rd Ed., Vol. I, Sec. 4.103[2], p. 337, it is stated:

> A much needed public improvement ought not to be delayed because the owner of one of the lots to be taken lives at a great distance or is wholly unknown. It would not be right that condemnation proceedings, fully consummated, be set aside and public works, already constructed, be torn down because a missing heir, whose existence could not be known at the time of the taking, suddenly appears and demands that the property of which he claims to have been unconstitutionally deprived be restored to him. Even in private matters constructive notice is often held effectual against persons who cannot readily be reached. The furtherance of

> public objects cannot be made more onerous by the absence of the owners of land, and a non-resident owner can reasonably be expected to keep an agent near the property, to read the local newspapers, and to visit the land itself to see if any notices have been posted upon it. It is accordingly, generally, held that a non-resident owner need not be notified personally; some reasonable form of constructive notice satisfies the constitution.

That statement is supported by *Huling* v. *Kaw Valley Railway Co.*, 130 U.S. 559, 564 (1889), and *Walker* v. *City of Hutchinson*, 352 U.S. 112, 115-116 (1956). Cf. *Mitchell* v. *Reichelderfer*, 57 F. 2d 416 (C.A.D.C., 1932); *United States* v. *Norman Lumber Company*, 127 F. Supp. 518 (M.D.N.C. 1955), affirmed 223 F. 2d 868, cert. den. 350 U.S. 902. Moreover, actual knowledge of the proceedings by a claimant should defeat any objection based on lack of personal service or notice by publication. Cf. *Phillips* v. *United States*, 151 F. 2d 645 (C.A. 7, 1945). Since appellants admitted in their pleadings that they obtained personal knowledge of the condemnation action over three months before judgment was entered (R. 27), the trial judge could hardly be expected to have been impressed by appellants' emphasis on lack of personal notice as an important factor in determining the merit of their motion to vacate his judgment.

Furthermore, appellants' attack on the fairness of the condemnation award is without merit. The discrepancy between the amount awarded and appellants' alleged valuation of the property is based on

an unrealistic and erroneous theory of valuation. It is now well established that the measure of recovery in a condemnation action is the fair market value of the property. *Olson* v. *United States*, 292 U.S. 246, 255 (1934); *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377 (1946); *United States* v. *Toronto Nav. Co.*, 338 U.S. 396, 402 (1949). Even assuming that the appellants' appraiser who prepared the affidavit could qualify as an expert witness, it is obvious that an opinion as to the assay value of an indeterminate quantity of ore, arrived at by multiplying the estimated quantity of ore by its per ton value at the surface, is patently erroneous as a measure of the fair market value of Parcel 481. *United States* v. *Meyer*, 113 F. 2d 387 (C.A. 7, 1940), cert. den. 311 U.S. 706; *United States* v. *Land in Dry Bed of Rosamond Lake, Cal.*, 143 F. Supp. 314 (S.D. Cal., 1956); *United States* v. *13.40 Acres of Land*, 56 F. Supp. 535 (N.D. Cal., 1944); *United States* v. *Indian Creek Marble Co.*, 40 F. Supp. 811 (E.D. Tenn., 1941). In that connection this Court has stated: "While the remedial statute [Rule 60(b)] is to be liberally construed, there still exists a definite burden on the moving party to prove the existence of the fraud, or other misconduct, or other cause for relief." *Atchison, Topeka and Santa Fe Railway Co.* v. *Barrett*, 246 F.2d 846, 849 (1957). And where the so-called newly discovered evidence, if received, would not have changed the result, there is nothing to indicate an abuse of discretion under Rule 60(b). *Union Bleachery* v. *United States*, 176 F.2d 517 (C.A. 4, 1949).

In short, since appellants had adequate notice of the condemnation proceeding and since their attack on the compensation awarded is based on an erroneous theory of valuation, there is nothing to indicate an abuse of the district court's discretion in this case. Cf. *Cole* v. *Fairview Development*, 226 F.2d 175 (C.A. 9, 1955). On the contrary, the trial judge's refusal to vacate his prior judgment and reopen the case under such circumstances constituted an eminently sound decision.

B. *Rule 60(b) was not designed as an alternative to a motion for new trial or review by appeal*:— There is in this case an additional consideration why appellants cannot succeed in their attempt to vacate the judgment. By his own admission, appellant Leslie M. Siberell received personal notice of this condemnation action by telephone on July 22, 1957, the date of the hearing to determine just compensation for the property taken (R. 27). During August and September he corresponded with the United States Attorney (R. 18-20). Shortly after October 22, he received copies of the findings of fact, conclusions of law, judgment and decree in the condemnation action (R. 27). Judgment was entered November 1, 1957 (R. 40), but appellants gave no indication to the court that its final judgment was contested until five months later when they filed their first motion to vacate. Between July 22, 1957, when Leslie M. Siberell obtained personal notification of the proceedings and late in March 1958, appellants did not file a motion to postpone judgment, a motion for retrial, or a notice of appeal within the applicable time limits.

In such circumstances an appellant "cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong * * *. There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from." *Ackerman* v. *United States*, 340 U.S. 193, 198 (1950). Moreover, the provisions of Rule 60(b) "were not intended to benefit the unsuccessful litigant who long after the time during which an appeal from a final judgment could have been perfected first seeks to express his dissatisfaction." *Morse-Starret Products Co.* v. *Steccone*, 205 F.2d 244, 249 (C.A. 9, 1953). "Certainly Rule 60(b) was not designed to afford machinery whereby an aggrieved party may circumvent the policy evidenced by the rule limiting the time for appeal." *Perrin* v. *Aluminum Co. of America*, 197 F.2d 254, 255 (C.A. 9, 1952).

Appellants attempt to evade these controlling cases by asserting that they do not fit their situation (Br. 8-9). We submit that since the judgment in question was entered in an *in rem* condemnation proceeding of which appellants had adequate notice, the effect of their failure to appeal within the required time limitation must be no different from any of the cases above cited. Any other result would mean that publication notice to unknown defendants in *in rem* proceedings does not constitute adequate notice, and that judgments against the property under such circumstances may be vacated at the will of the former landowner—even though he knew of the proceedings months before the judgment was entered. Such a

novel principle cannot be seriously entertained. Final judgments were intended to be, not tentative things, but decrees having finality. *Bullen* v. *DeBretteville*, 239 F.2d 824, 829 (C.A. 9, 1956); *United States* v. *Kunz*, 163 F.2d 344 (C.A. 2, 1947); *Lehman Co.* v. *Appleton Toy & Furniture Co.*, 148 F.2d 988 (C.A. 7, 1945).

While it is true that the opinion of Mr. Justice Black in *Klapprott* v. *United States*, 335 U.S. 601, 614-615 (1949), stated that subsection (6) of Rule 60(b) empowered courts "to vacate judgments whenever such action is appropriate to accomplish justice", this statement must be construed in the light of the factual situation to which it was addressed. Klapprott was seeking relief from a default judgment depriving him of his citizenship. Judgment had been entered without supporting evidence. Klapprott was without counsel and had no opportunity to obtain counsel, and the lower court had found that he was deprived of any reasonable opportunity to defend the action. The cases cited in the appellants' brief in which judgments were actually vacated involved similarly unique situations: In *In Re Cremidas' Estate*, 14 F.R.D. 15 (D. Alaska, 1953), the petitioner's attorney, who was representing the rights of an infant in a probate proceeding, was in such a state of drunkenness throughout the hearing as to be incapable of presenting the case on its merits and available witnesses were not called to testify on behalf of the minor child. The court took judicial notice of the fact that there were no other attorneys available in the vicinity of Nome during the period

in question, and petitioner was without funds to obtain counsel from another area. *Barber* v. *Turberville*, 218 F.2d 34 (C.A.D.C., 1954), involved a default judgment for $10,000.00 caused by the negligence of plaintiff's lawyer, and *Tozer* v. *Charles A, Krause Milling Co.*, 189 F.2d 242 (C.A. 3, 1951), presented a situation where the appellant had never been properly notified of the contract action instituted against it, where appellant had a complete defense to the actions, and the court felt that matters involving large sums of money should not be determined by default judgments if it could be reasonably avoided. Such cases constitute actions *in personam*, not *in rem*, and therefore, unlike this case, lack of personal notice becomes an important consideration in determining the merit of the motion to vacate judgment. Cf. *United States* v. *Norman Lumber Company*, 127 F.Supp. 518, 519-520 (M.D.N.C., 1955), affirmed 223 F.2d 868, cert. den. 350 U.S. 902.

A grant of judicial discretion under Rule 60(b) to deal with exceptional cases presenting compelling considerations of justice and equity cannot possibly be so extended as to open the doors generally to allow relief from a judgment whenever a litigant, by hindsight, concludes that his decision not to appeal the judgment was ill-advised. See *Ackerman* v. *United States*, 340 U.S. 193 (1950). It must be remembered that "while the Rule [60(b)] should be construed liberally in the interest of securing substantial justice between litigants, nevertheless it is desirable that a final judgment be not lightly disturbed * * *. If

judgments are vacated on tenuous and insignificant grounds they will lack finality, and there will be no end to litigation." *Cox* v. *Trans World Airlines, Inc.*, 20 F.R.D. 298, 300 (W.D. Mo., 1957). We submit that litigation would indeed be interminable if an application under Rule 60(b) could be granted on such a showing as appellants made below. Their motion is nothing more than a plea to be relieved of a voluntary and deliberate decision neither to move for a new trial between July 22 and November 11, 1957, nor to file a notice of appeal within sixty days after entry of the final judgment. For this reason alone, the district court was correct in denying the appellants' motion to vacate.

CONCLUSION

For the foregoing reasons, we submit that the district court did not abuse its discretion in refusing to vacate its judgment of November 1, 1957, and therefore that its order denying appellants' motion to vacate the 1957 judgment must be affirmed.

Respectfully,

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